

A
L E T T E R
T O A
F R I E N D,

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CONCERNING
Marriage Contracts:

Occasioned by a late APPEAL from
the Dean of the Arches to a Court
of DELEGATES.

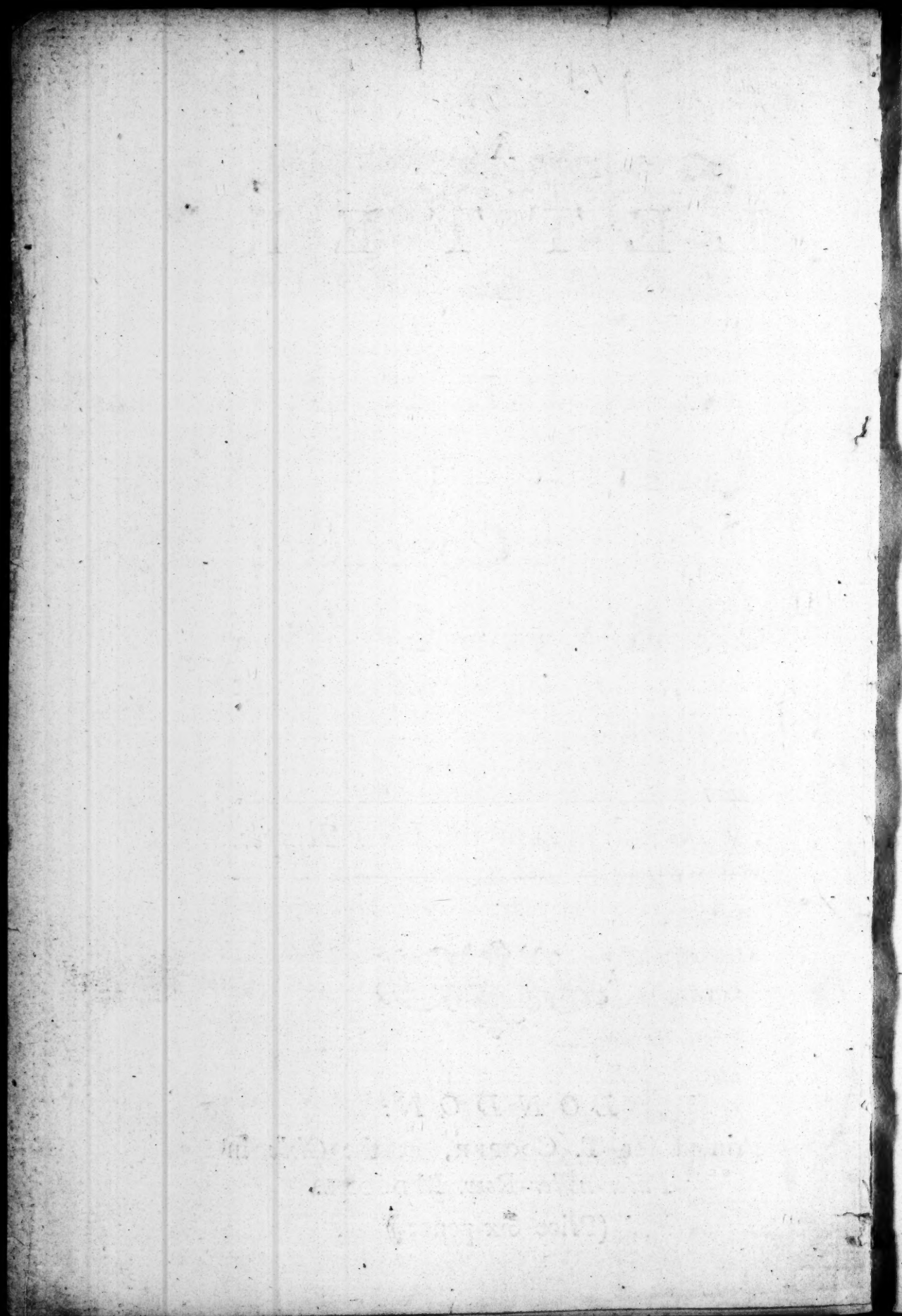
By a Gentleman of the *Inner-Temple*.

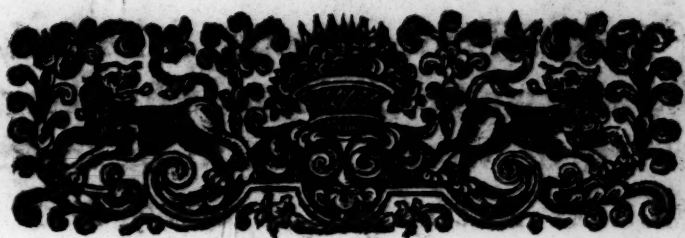


L O N D O N:

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A
L E T T E R
T O A
F R I E N D, &c.

S I R,

I Attended the three Days Hearing before the Court of Delegates, upon a late Appeal from a Sentence of the Dean of the Arches, concerning a *Contract of Marriage*, though I assure you I am an absolute Stranger to either of the Parties.

In the Course of it I could not help taking Notice of a Matter

of Fact, affirmed by one of the Council, a very able *Civilian*, in his REPLY, which *he* would have to be looked upon as *Ecclesiastical* Law, and of considerable Weight in his Client's Cause; but which, if admitted so to be, must shake the Validity of all CONTRACTS OF MARRIAGE in the Realm, except those of *Quakers*; I here trouble you and the Public with some Thoughts concerning it.

The Doctor's Assertion was to this Effect, and I believe almost in the very Words following, *viz.* “ That
 “ though he had been a Practicer in
 “ the Court of the Arches for thirty
 “ Years, yet he took upon himself to
 “ affirm, *bonâ fide*, That he never
 “ knew, or could learn, that a CONTRACT OF MARRIAGE had ever been
 “ pronounced for by the *Ecclesiastical*
 “ Judge upon PAROLE EVIDENCE
 “ ONLY.”

As to the Truth of the Assertion, as far as relates to the Doctor, for whom I have a great Esteem, I have
 not

not the least Doubt: but I own I was not a little surprized, that a Doctrine so strange, not to say absurd, should be insinuated to be *Ecclesiastical Law*; since it appeared to maintain, that the most *usual* Contract of Marriage, *viz.* a Contract *per verba de præsenti*, which is in the Nature of it always *parole*, could not possibly be *legally* proved in the *Spiritual* Court the very *Moment* after it was made; for in that *Instant* it is absolutely incapable of any other than the *parole* Proof of those who were present at it.

If this is *Ecclesiastical Law*, then a Man marrying a Woman in her Chamber, before three or four Witnesses, let him but take care not to give her any *Writing* under his hand, testifying the Marriage, and he may leave her when he pleases by the *Spiritual Law*; for she can only give *parole* Proof of the Marriage, which it seems will not be sufficient. Nay, let a Marriage be in the Church,

3

before

before *Six*, or *Six hundred* Witneſſes, the Gentleman may bid adieu to his Spouſe as ſoon as he comes out of the Church Door, for the *Eccleſiaſtical* Judge is not to eſtabliſh ſuch Marriage, becauſe the poor Woman has ſtill only *parole* Evidence to produce of the Contract. Neither will the *Register* of ſuch Marriage mend the Matter, for the *Register* being only a *Memorandum* of a *parole* Contract, is itſelf only *parole* Evidence, it not being *uſually*, I believe it *never* is, ſigned by either of the contracting Parties.

As this Poſition therefore ſeemed to be of ſuch dangerous Conſequence, though I am perſuaded the learned Advocate himſelf was not aware of it, I could not forbear looking into my Statute-Book the Moment I got home, when, to my great Satisfaction, I found that the Doctor's *Eccleſiaſtical* Law was flatly contradicted by the Words of an Act of Parliament, by which it is expreſſly declared,

clared, if I understand the Meaning of the Words, *That for Proof of a Contract of Marriage TWO Witnesses by the Ecclesiastical Law are ONLY required.*

The Statute I mean is of the 32d Year of King *Henry* the Eighth, Chapter 38. which, though repealed as to *Precontracts* by the Statute of the 2d and 3d of King *Edward* the Sixth, yet such Part thereof as is declaratory of the Ecclesiastical Law of that Time is, by the same Statute of *Edward* the Sixth, established, and made part of the Ecclesiastical Law of this Realm.

The Words of the Statute of the 32 *H.* 8. are as follow:

“ Whereas heretofore divers and
 “ many Persons, after long Conti-
 “ nuance together in Matrimony,
 “ without any Allegation of either
 “ of the Parties, or of any other at
 “ their Marriage, why the same Ma-
 “ trimony should not be good, just
 “ and lawful, and after the same
 Matri-

“ Matrimony solemnized, and con-
 “ summate by carnal Knowledge,
 “ and also sometime Fruit of Chil-
 “ dren ensued of the same Marriage,
 “ have nevertheless, by an unjust
 “ Law of the Bishop of *Rome*, [This
unjust Law of the Bishop of *Rome*,
as it is here styled, is, as we shall see
 presently, part of the Ecclesiastical
 Law of the Realm at this Day, by
 the Statute of the 2d and 3d of *Ed-*
ward the Sixth] which is, “ That
 “ upon Pretence of a *former Con-*
 “ *tract* made, and not consummate
 “ by carnal Copulation, *for Proof*
 “ *whereof two Witnesses by that Law*
 “ *were only required*, been divorced
 “ and separate, contrary to GOD’s
 “ Law, and so the true Matrimony,
 “ both solemnized in the Face of
 “ the Church, and consummate with
 “ bodily Knowledge, and confirmed
 “ also with the Fruit of Children
 “ had between them, clearly fru-
 “ strate and dissolved, *It is enacted*,
 “ that from the first Day of *July*

“ 1540, all Marriages being contract
 “ and solemnized in the face of the
 “ Church, and consummate with
 “ bodily Knowledge, shall be deem-
 “ ed, judged and taken to be lawful,
 “ good, just and indissoluble, not-
 “ withstanding any Precontract or
 “ Pre-contracts of Matrimony not
 “ consummate with bodily Know-
 “ ledge, &c.”

This Part of the Statute of the
 32 *H.* 8. though it only sets aside
 Pre-contracts *without* Consummation,
 as against subsequent Marriages solemn-
 ized in the face of the Church *with*
 Consummation, was found to be in-
 troductive of such Mischiefs, that in
 the Preamble of the Statute of the
 2d and 3d of *Edward* the Sixth,
 which repeals the Statute of the 32
H. 8. as to *Pre-contracts*, in less than
Ten Years after it was made, it is re-
 cited, “ That sithence the Time of
 “ the said Act [of the 32 *H.* 8.]
 “ although the same was godly
 “ meant, the Unruliness of Men hath
 B “ ungodly

“ ungodly abused the same, and di-
 “ vers Inconveniencies (intolerable
 “ in manner to Christian Ears and
 “ Eyes) followed thereupon, Wo-
 “ men and Men breaking their own
 “ Promises and Faiths made by the
 “ one unto the other, so set upon
 “ Sensuality and Pleasure, that if af-
 “ ter the Contract of Matrimony
 “ they might have whom they more
 “ favoured and desired, they could
 “ be content by Lightness of their
 “ Nature to overturn all that they
 “ had done afore, and not afraid in
 “ manner, even from the very *Church*
 “ *Door* and *Marriage-Feast*, the
 “ Man to take another Spouse, and
 “ the Espouse to take another Hus-
 “ band, more for bodily Lust and
 “ carnal Knowledge, than for Sure-
 “ ty of Faith and Truth, or having
 “ God in their good Remembrance,
 “ contemning many Times also the
 “ Commandment of the Ecclesiasti-
 “ cal Judge, forbidding the Parties
 “ having made the Contract to at-
 “ tempt

“ tempt or do any thing in Prejudice
 “ of the same:” *and then the Sta-*
tute goes on and enacts, “ That as
 “ concerning *Pre-contracts*, the said
 “ former Statute shall from the first
 “ Day of *May* next coming, cease,
 “ be repealed, and of no Force or
 “ Effect, *and be reduced to the E-*
state and Order of the King's Ec-
clesiastical Laws of this Realm,
 “ *which immediately before the mak-*
ing of the said Estatute, in this
 “ *Case were used in this Realm :* So
 “ that from the said first Day of *May*,
 “ when any Cause or Contract of
 “ Marriage is pretended to have been
 “ made, it shall be lawful for the
 “ King's Ecclesiastical Judge of that
 “ Place to hear and examine the
 “ said Cause, and having the said
 “ Contract *sufficiently and lawfully*
 “ proved before him, to give Sen-
 “ tence for Matrimony, command-
 “ ing Solemnization, Cohabitation,
 “ Consummation, and Tractation,
 “ as it becometh Man and Wife to

“ have, with inflicting all such Pains
 “ upon the Disobedients and Di-
 “ sturbers thereof, as in Times past,
 “ *before the said Statute*, the King’s
 “ Ecclesiastical Judge, by the King’s
 “ Ecclesiastical Laws, ought and
 “ might have done, *if the said Sta-*
 “ *tute had never been made*, any
 “ Clause, Article or Sentence in the
 “ said Statute to the contrary in any
 “ wise notwithstanding.”

This Statute reduces the Ecclesi-
 astical Laws relating to *Contracts of*
Marriage, to the State and Order
 which *immediately before the mak-*
ing of the Statute of the 32d of
H. the 8th. were used in this Realm,
 which was, as we have seen, That
 a Marriage Contract proved by the
 Testimony of *two* Witnesses *only*
was sufficient, and *used* by the *Ec-*
clesiastical Judge to be established
 and confirmed ; therefore a Contract
 of Marriage is *lawfully* and *sufficient-*
ly proved, by the express Words of
 this

this Statute, before the *Ecclesiastical* Judge at this Day, by the Testimony of *Two* Witnesses *only*, i. e. by *parole* Evidence *only*, and ought therefore to be confirmed by the *Ecclesiastical* Judge, according to the said Statute.

That this was the *Ecclesiastical* Law of the Realm *immediately before* the Statute of the 32d of *H. 8.* appears not only from the Words of the Statute itself, as we have seen, but also from a Case reported in *Dyer* in *Trinity Term* in the 28th of *Hen. 8.* which is but *four* Years before that Statute.

The Case is this: *Dyer's Reports*, fol. 13. A Man gives Goods to another with his Daughter in Marriage. They are afterwards divorced by the Spiritual Court. The Question was, Whether the Woman should have her Goods again? The Lord Chief Justice of the Common Pleas, *Baldwin*, and Mr. Justice *Fitzherbert* were of Opinion that ~~she~~ ought

ought to have them again; and one of the Reasons they give is this, "*Poit estre que ils pürront estre divorce pur cause de Precontract, testmoigne per deux faux testes.*" Perhaps they were divorced on account of a Pre-contract upon the Testimony of two false Witnesses [suborned by the Husband.] Which Reason necessarily implies, that Two Witnesses were sufficient to prove such Pre-contract in the Ecclesiastical Court at that Time.

That this was the Practice of the Ecclesiastical Courts not twice thirty Years ago, appears from *Conset's Practice of the Ecclesiastical Courts*, a Book of good Authority, which was first published in 1681, not only for that in his whole Chapter of *Matrimonial Contracts* he never makes Evidence in *Writing* any necessary Part of the Proof of a Marriage Contract, but from what he lays down expressly *Part VI. Cap. I. Sect. 12.* That a matrimonial Contract proved by

by *two* Witnesses, who are without all Exception, is sufficient to dissolve a subsequent Marriage, lawfully solemnized and consummate, and confirmed by daily Cohabitation together, in exact Agreement with the Words of the Statute of the 32 *H.* 8. tho' he adds, that *two* are the *fewest* in such a Case. Nay, he farther lays down, that the *Ecclesiastical* Court will so far favour the *Plaintiff* in proving a *Marriage Contract*, which is generally made *secretly* and in a *Chamber*, that he says, (*ibid.* *Seēt.* 8.)

“ Though generally Witnesses are
 “ not admitted after *Publication*, yet
 “ in a *Matrimonial* Cause they are
 “ admitted, yea *without* the Oath,
 “ (*That Witnesses are newly come to*
 “ *the Knowledge of the Party produc-*
 “ *ing them, after the Attests are pub-*
 “ *lished*) and admit also, that Sen-
 “ tence is pronounced *against* the
 “ Plaintiff in a *Matrimonial* Cause,
 “ *That he hath failed in the Proof of*
 “ *his Libel, and that the Defendant*
 “ *is*

“ *is absolved*; yet the Plaintiff may
 “ (either in the same Court, or in
 “ any other competent Court) insti-
 “ tute a *new* Matrimonial Cause, a-
 “ gainst the *same* Person, not only
 “ upon a *new* or *second* Contract,
 “ but also upon the *former*; and
 “ thereupon may produce Proofs,
 “ whether *known* or *unknown* to him
 “ at the first. And in this Case, the
 “ Exception, *That the Matter is ad-*
 “ *judged*; or, *That the aforesaid Sen-*
 “ *tence hath its Effects upon the Mat-*
 “ *ter adjudged*, hinders not, because
 “ a Sentence pronounced in a *Ma-*
 “ *trimonial* Cause *against* a Mar-
 “ riage, doth never pass upon the
 “ Thing adjudged, seeing these Mat-
 “ ters of Contract have many Privi-
 “ leges; and as often as the Church
 “ is deceived, by pronouncing Sen-
 “ tence *against* a Marriage; by *new*
 “ Proofs, also, nay sometimes *upon*
 “ *the very same Proofs*, the former
 “ Sentence may be *revoked*: The
 “ Reason is, to avoid the Sin and
 “ Danger

“ Danger of the Soul, if an unjust
 “ Sentence should take Effect, and
 “ have place.”

And he adds farther, *sect. 14.* “ If
 “ in a *Matrimonial* Cause the *Plain-*
 “ *tiff* doth prove a *Matrimonial Con-*
 “ *tract*, by *one* sufficient Witness,
 “ who is without all Exception, and
 “ doth prove a *Treaty* by others; or
 “ doth prove an Acknowledgment
 “ by *two* Witnesses, the Parties being
 “ *present*, or if he proves a Contract
 “ for a *future* Marriage by *two* Wit-
 “ nesses, and a *Treaty* by the *same*,
 “ or other Witnesses; or doth prove
 “ an immediate Marriage by *two* Wit-
 “ nesses, and these Proofs are after-
 “ wards taken away by *lawful Ex-*
 “ *ceptions, unknown to the Party*
 “ *producing them*; or if the Proofs
 “ of the *Plaintiff* are made *difficult*,
 “ that is, if the Witnesses do cease
 “ to be without all Exception, [or]
 “ by reason of a *former* Contract, or
 “ *Marriage*, or by a *subsequent* So-
 “ lemnization of a Marriage made
 C “ whilst

“ whilst the Suit depends; *in these*
 “ *Cases*, the Judge is wont (although
 “ he have pronounced Sentence for
 “ the *Defendant*) to condemn the said
 “ *Defendant*, so obtaining the Sen-
 “ tence, in Charges made by the Plain-
 “ tiff.

The Statute for *Prevention of*
Frauds and Perjuries, in the 29th of
Charles II. has made no Alteration
 in the Law with respect to *Contracts*
of Marriage, for neither those in the
present Tense nor in the *future*, as
 they are styled, are mentioned in that
 Act; neither, if *Contracts of Marriage*
 were comprehended under the *Equity*
 of the said Act, *as was contended*, can
 a Contract *per verba de præsenti* be in-
 cluded in it, for it is out of the express
 Purview of it; it being an Agreement
 that wants no *future* Time for the
 Performance of in the *Spiritual* Court,
 for such Contract is there *ipsum ma-*
trimonium, very Matrimony itself.

But I am persuaded the Legislature
 left them *both* out of the Act on pur-
 pose,

pose, it being most unreasonable to require a Proof in *Writing*, of such Contracts as ever were made *per verba*, or by *Parole*, and which by the Custom and Usage of the Realm never were reduced into *Writing*, except amongst *Quakers*, (not even whilst Marriages were solemnized before Justices of the Peace;) a Marriage in the *Church* being incapable of Proof in *Writing*, as well as a clandestine Contract in a *Chamber*, unless by mere Accident.

It appears also from the Opinion of the Court of *King's Bench* in the Case of *Collins* versus *Jessot*, in *Easter Term Anno 3 Reginæ Annæ*, reported in 6th *Modern Report*, p. 155. That Contracts of Marriage by *Parole*, either in the *present* Tense or the *future*, are as good and valid in Law now, as they were *before* the Statute of the 29 of *Charles II.* The Words of the Lord Chief Justice *Holt* are these :

“ If Contract be *per VERBA de præ-*
 “ *senti*, it amounts to an *actual* Mar-
 C 2 “ riage,

“riage, which the very Parties them-
 “selves cannot dissolve by Release,
 “or other mutual Agreement ; for
 “it is as much a Marriage in the Sight
 “of GOD, as if it had been *in fa-*
 “*cie Ecclesiæ* ; with this Difference,
 “that if they cohabit *before* Mar-
 “riage *in facie Ecclesiæ*, they are for
 “that punishable by Ecclesiastical
 “Censures ; and if *after* such Con-
 “tract either of them lies with ano-
 “ther, they will punish such Offend-
 “er as an Adulterer.

“And if the Contract be *per VER-*
 “*BA de futuro*, and *after* either of
 “the Parties so contracting, without
 “a previous Release or Discharge of
 “the Contract, marry another, it
 “will be a good Cause of a Dissolu-
 “tion of a *second* Marriage, and of
 “decreeing the *first* Contract’s being
 “perfected into a Marriage.” Upon
 which the Reporter says, “*Quæ omnia*
 “*tota Curia concessit*, except the last
 “Point, whereof *Powell* doubted.”

Upon

Upon which *Holt* Chief Justice added, “ that it was first resolved in
 “ my Lord *Vaughan*’s Time, that an
 “ Action would well lie at Common
 “ Law, for Breach of such an execu-
 “ tory Contract *per VERBA de futuro*,
 “ which Resolution *Vaughan*, *totis*
 “ *viribus*, opposed, because the Par-
 “ ty had this Remedy in the *Spiritual*
 “ Court, which was agreed by all.

“ But notwithstanding it was re-
 “ solved the Party had his Election of
 “ either Remedy, and that by bring-
 “ ing Action at Common Law, and
 “ that appearing on Record, the Re-
 “ medy in the *Spiritual* Court was
 “ actually released ; for now, in *lieu*
 “ of Performance of the *Contract*, he
 “ shall recover Damages.”

And in the Case of *Hutton* versùs *Mansell*, reported there, p. 172. it is held, that a Promise of Marriage may be by Implication *only*.

“ Case was brought, laying mu-
 “ tual Promises of Marriage between
 “ *Plaintiff* and *Defendant*, and Breach
 “ in

“ in the Man the *Defendant*. Upon
 “ Evidence, exprefs Promise was
 “ proved upon the *Man*, but none
 “ on the *Woman*’s Side.

“ *Per Holt*, Ch. J. If there be an
 “ exprefs Promise by the Man, and
 “ that it appear the Woman counte-
 “ nanced it, and by her Actions at
 “ that Time behaved herself so as if
 “ she agreed to the Matter, though
 “ there be no *actual* Promise, yet
 “ that shall be sufficient Evidence of
 “ a Promise on her Side. And he
 “ remembred a Case in which he had
 “ been a Counsel, in my Lord Chief
 “ Baron *Montague*’s Time, where it
 “ had been so ruled upon Evidence
 “ against his Client, and being dissa-
 “ tisfied therewith, he put the Case
 “ to eminent Men of those Times,
 “ who all concurred in opinion with
 “ the Chief Baron.”

Having now shewn that *two* Wit-
 nesses are a *legal* and *sufficient* Proof
 of a Marriage Contract in the *Spiri-*
tual Court by the Statutes of this
 Realm,

Realm, I shall cite a very ancient Case which is reported by *Fortescue*, in the Reign of King *Henry* the Sixth, in his Treatise *de Laudibus Legum Angliæ*, for the Truth of which he appeals to the Prince. It is to the following Effect.

One Master *John Frynge*, after he had been three Years in Holy Orders, was charged, by the Oaths of *two* Witnesses, to have contracted himself to a certain young Woman before he entered into Orders, upon which he was forced to leave the Sacerdotal Function, and to consummate the Marriage with her. He lived with her afterwards fourteen Years; had seven Children by her; was convicted of High Treason against his Royal Highness, and at the Place of Execution confessed, before all the People there, that those Witnesses had been suborned, and that what they had sworn was false.

Fortescue's own Words are these, *Cap. 21.* "Nosti & Tu, Princeps di-
" vine,

“ vine, qualiter jam tardè magister
 “ Johannes Frynge, postquam annis
 “ tribus Sacerdotali functus est offi-
 “ cio, *duorum* iniquorum *depositione*,
 “ qui eum antea Juvenulam quan-
 “ dam affidâsse testati sunt, Sacrum
 “ Presbyteratûs Ordine relinquere
 “ *compulsus est*, & *matrimonium cum*
 “ *scæminâ illâ consummare*. Cum
 “ quâ postquam annis quatuordecim
 “ moratus sobolem septimam fuscita-
 “ verat, demum de crimine læsæ ma-
 “ jestatis in tuam celsitudinem con-
 “ jurato convictus, subornatos fuisse
 “ Testes illos, & falsum dixisse Te-
 “ stimonium in mortis suæ articulo
 “ coram omni populo fassus est.”

Fortescue, indeed, produces this
 Case to shew, that Proceedings after
 the Course of the *Civil* Law, by Exa-
 mination of Witnesses upon *Interro-*
gatories, are much more liable to Er-
 rors and unjust Judgments, than our
Common Law Method of Trial by *Ju-*
ries, which I believe most People are
 persuaded of; and I am not therefore
 without

without some Hopes that the *Legiflature* will one day ſubject *clandestine* Marriage Contracts, at leaſt, to the Deciſion of a *Jury*. But I think it alſo proves what it was quoted for, *viz.* that by the ancient *Eccleſiaſtical* Law of this Realm, a Marriage Contract, ſupported by the Teſtimony of *two* Witneſſes, *uſed* by the Sentence of the *Eccleſiaſtical* Judge to be confirmed, long before either the Statute of *Edward* the Sixth, or *Henry* the Eighth were made.

This *Eccleſiaſtical* Law owes its Origin, without doubt, to the *Civil* Law, by which *two* Witneſſes are ſufficient for the Proof of *any* Fact. “ In
 “ *Litis Conteſtatione veritas per Leges*
 “ *Civiles Teſtium deſoſitione proba-*
 “ *ri debet, in quâ Duo Teſtes idonei*
 “ *ſufficiunt.* *Forteſcue, ibid. cap. 20.*
 The *Civil* Law very probably deduces it from a much higher Original, the *Jewiſh* Law, *Deuteronomy* xix. 15.
 “ *One Witneſs ſhall not riſe up a-*
 “ *gainſt any Man for any Iniquity,*

D

“ or

“ or for any Sin, in any Sin that he
 “ sinneth: at the Mouth of *two* Wit-
 “ nesses, or at the Mouth of three
 “ Witnesses shall the Matter be esta-
 “ blished.” And to this Law our
 blessed Saviour alludes, when he says
 to the *Jews*, *John* viii. 17. “ It is
 “ also written in your Law, that the
 “ Testimony of *two* Men is true.”

The modern Proceeding in the *Ec-
 clesiastical* Courts, in relation to what
 the *Civilians* call the SUPPLEMENTARY
 OATH, is grounded upon, and presup-
 poses this Necessity of *Two* Witnesses,
 and *Two only*, for Proof of any Fact
 by their Law.

This SUPPLEMENTARY OATH, a Proceed-
 ing unknown to our Courts, either of
Law or *Equity*, is admitted in that
 Court, as I take it, where a Fact is
 proved by *one* Witness only, who,
quamvis omni Exceptione major, yet,
 being but a *single* Witness, can induce
 only what is styled *Semiplena Proba-
 tio*, a *legal* incomplete Proof, in
 which Case the *Spiritual* Court being
 satis-

satisfied of the Truth and Reality of the Fact will supply the *Informality* of it, by permitting the Party himself to swear to it, and thereby what was before only *Semiplena* becomes *plena Probatio*, full and *legal* Proof; the Testimony of the Party *supplying* the Place of *one* Witness, the Fact is now considered as proved by *two* Witnesses, the whole Proof required by the *Ec-
clesiastical* Law.

This *Suppletory Oath* was administered by the Court of Delegates some Years ago, in the Case of Dr. *Williams* and Lady *Bridget Osborne*, about a Marriage Contract. In which Cause the Party herself denied the Marriage upon Oath; the Clergyman also, who married them, denied the same upon Oath at the *first*, but in a Day or two after, repenting of what he had sworn, disclosed the whole Truth of the Matter; upon which, other Circumstances concurring, Dr. *Williams* was admitted to his *Suppletory* Oath; and his *own* Marriage with

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Lady *Bridget* was thereupon established by Sentence of the Court.

This Method of *supplying* the want of a *second* Witness, by the Oath of the *Party*, was probably found out and introduced by the *Spiritual* Court to maintain and keep up its Jurisdiction, which otherwise, in many Cases, would be ousted by *Prohibitions* from the *Temporal* Courts.

Thus where a Proof by *one* Witness of a *Release of a Legacy*, or of a *Setting out of Tithes*, or *Payment of Tithes*, &c. has been *disallowed* in the *Ecclesiastical* Court, a *Prohibition* has been granted for such Refusal; for inasmuch as *one* Witness is sufficient Proof by the *Common Law*, the *Disallowance* of such Proof in the *Ecclesiastical* Court is contrary to the Law of the Land, and a Prohibition is therefore to be granted. See *Godolphin's Repertorium Canonicum*, Edit. 2da, p. 113, 128, & 362.

But I suppose it will be said, that the same Countenance and Credit is not
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to be given to Witnesses of a *clandestine* Contract, as of a *public* Marriage.

If by a *public* Marriage is here meant a Marriage *really* solemnized in the Face of the Congregation, I own I think so too; but if by a *public* Marriage, such an one is denoted as is solemnized in the Church, by a *Licence*, in the Presence of the Congregation, consisting *only* of the *Clergyman*, the *Gentleman*, his intended *Spouse*, and her *Woman*, as is often the Case, I cannot see any very great Difference between such Marriage Contract in the *Church*, and a clandestine one in a *Chamber*, in the Presence of *two* Witnesses: and if the Doctor's *Ecclesiastical* Law is to prevail, both of them must meet with the same Fate before the *Ecclesiastical* Judge; for as the Proof of both stands on the *PAROLE* Testimony of *two* Witnesses *only*, Sentence must be given, *That both the pretended Parties have totally failed in the Proof of both such pretended Contracts.*

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In this case, the Mischiefs consequent upon the *public* Marriage may be much greater than those of the *clandestine* Contract. For let us suppose both the Marriages either to be consummated, or not; the *Gentlemen*, for some Reason or other, repent afterwards—Leave the *Women*, and refuse to maintain them. Let us also suppose the *Clergyman* to be dead, and no body to be found to whom he ever declared that he married them:

The *Lady's Woman* is still alive, and her Oath is sufficient Evidence to a *Jury* to establish the *public* Marriage in the *Temporal* Courts. The Man accordingly possesses himself of all the Woman's Estate, Goods and Chattels.

She libels against him in the *Ecclesiastical* Court for *Conjugal Rights* and *Alimony*, and offers the Testimony of her *Maid* in Support of her Marriage.

The *Civilian* will say in this Case, —Here is only one *single* Witness of the Fact, and she liable to very great Exception; *Testis nullius Dignitatis,*
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aut Estimationis, a Person of no Rank or Character, and therefore very little regarded by our Law; a Witness who may well be supposed to have great Expectancies from her Mistress's succeeding in the Suit, and therefore such an one *cui temerè fides non est adhibenda*. Besides, if she were *omni Exceptione major*, yet we want another Witness to *examine* and *try* her Account of the Matter by; and the whole is but *parole* Evidence at the *best*. What then? why the poor Woman has failed in her Proof, and it is only a *pretended* Marriage; but however, the *pretended* Husband runs away with the Estate, the *Goods* of the Woman, and yet Holy Church is to be so nicely scrupulous, *according to the Doctor*, as not to oblige him to take the *good Woman* herself.

However, the *clandestine* Contractor is free from this Inconvenience, for here the Man must always take both *Bag* and *Baggage*, as is most reasonable, or renounce *both*.

Upon the whole therefore, I hope,
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in order to explain and inforce the Statute of King *Edward* the Sixth, which was made on purpose to prevent the scandalous Misdeeds of such, as having bound themselves to each other, sought *contra Jus Fasque*, to be loosed, it will be declared by Authority of Parliament, that from and after the 25th Day of *March*, in the Year of our LORD 1740, when any Cause or Contract of Marriage is pretended to have been made, the Ecclesiastical Judge of the Place shall hear and examine the said Cause, and having the said Contract well and sufficiently proved, by the Testimony of *two* Witnesses, or other lawful Evidence, to give Sentence for Matrimony, commanding Solemnization, Cohabitation, Consummation and Tractation, as it becometh Man and Wife to have, any *pretended* Usage of the *Ecclesiastical* Courts to the Contrary in any wise notwithstanding.

I am, S I R,

March 7, 1739-40.

Your very humble Servant,

M. N.

